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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1444

AMERICAN ACCEPTANCE CORPORATION,
a Delaware corporation,
Petitioner,

vs.

EDWARD P. SCHOENTHALER and AGNES A. SCHOENTHALER, husband and wife, and WILLIS H. YEAMANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, AMERICAN ACCEPTANCE CORPORATION, a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered by

said Court on the 29th day of January, 1968. A petition for rehearing, combining a motion for reference to and consideration by the Appellate Court in banc, was timely filed, and a brief in support of the petition for rehearing and reference to the Court in banc was filed simultaneously therewith. The petition and motion for rehearing in banc was denied by an order of said Court entered on March 27, 1968.

(A) OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida was filed December 2, 1965, and is shown in the printed Transcript of the Record, Vol. III, beginning at page 1080. A copy of the opinion is attached hereto as Appendix "A". A petition for rehearing from that opinion of the United States District Judge was timely filed (Tr. Vol. III, p. 1092). An order of the District Court denying the motion for new trial was filed December 23, 1965 (Tr. Vol. III, p. 1120). A copy of said order is attached hereto as Appendix "B".

The opinion, judgment and mandate on appeal, dated January 29, 1968, is shown at page 1157 of the supplemental certified record, and a copy thereof is attached hereto as Appendix "C". The petition for rehearing, combined with a motion for reference to and consideration by the Court in banc, is a part of the supplemental certified record beginning at page 1188, and the supporting brief is shown at page 1211. The order of March 27, 1968, denying the petition for rehearing and for rehearing in banc is shown in the supplemental certified record at page 1282, and a copy thereof is attached hereto as Appendix "D".

(B) JURISDICTION

(1) The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on the 29th day of January, 1968 and recorded on the same date, and a copy thereof as above referred to is attached to this petition as Appendix "C".

(2) The petition for rehearing was timely filed and said petition for rehearing was denied on March 27, 1968, and a copy thereof is attached hereto as Appendix "D".

(3) This petition is timely filed under Title 28, U.S.C., Section 2101(c). Jurisdiction conferred on this Court to review the judgment or decree in question by writ of certiorari is conferred under the provisions of Title 28, U.S.C., Section 1254(1), as a certiorari from the final judgment or decree by the United States Court of Appeals for the Fifth Circuit.

(C) QUESTIONS PRESENTED

This case involves the construction of a Florida Statute, Chapter 687.07, F.S.A., commonly referred to as the criminal and forfeiture usury statute of Florida, which is as follows:

> "687.07 **Forfeiture and penalty in case of excessive interest or charges.**—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or other-

wise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days."

The Maxwell Company, a Florida corporation, having its principal place of business in Miami, Dade County, Florida, was in the business of selling hotel, motel and commercial building furnishings and equipment on a commercial or wholesale basis and did a large business throughout the State of Florida. Edward P. Schoenthaler had under construction a motel at Naples, Florida, and he required complete furnishings and fixtures for the motel and for restaurant equipment in said motel. The terms of his first mortgage financing, then of record in the spring of 1964, required that the first mortgagee have a first mortgage not only on the buildings, but upon the complete furnishings and fixtures.

Schoenthaler approached Maxwell for a bid on the furnishings and fixtures and discussions were had with reference to the complete furnishings for the project. The estimation of the minimum cash sale price was $180,000.00, and the time sale differential for a 60-month payment, without interest, was $238,546.00. Schoenthaler could not give or enter into a retention title contract, because under the first mortgage of record the first mortgagee was entitled to a prior lien. He could not give a second mortgage because Willis H. Yeamans, the original owner of the land, held a second purchase money mortgage subordinated to the first mortgage in the amount of approximately $120,000.00. Schoenthaler had other minor obligations for expenses in the overall completion of the motel project.

Schoenthaler requested the aid and assistance of Maxwell to see if secondary additional financing could be ar-

ranged in the amount of $170,000.00. This was not in the line of business of Maxwell, but the Maxwell Company did agree that they would arrange financing for these collateral and secondary purposes to the extent of $170,000.00. That was to be on a straight simple interest of 10%, payable in installments. Schoenthaler elected to buy the furniture on the deferred payment plan and to borrow $170,000.00 in cash. This arrangement was consummated, the furniture was delivered and installed, the $170,000.00 was made available either in cash or to the credit of Schoenthaler, and Schoenthaler arranged for $100,000.00 of the $170,000.00 loan to be paid to Willis H. Yeamans for the release of his purchase money second mortgage. Schoenthaler used the balance of the $170,000.00 for additional supplies, furnishings and equipment not covered in the original time sale, plus the use of additional operating capital. The only money received from Schoenthaler out of the $170,000.00 cash advance was for some extra equipment for the restaurants in the amount of approximately $38,112.18.

A second mortgage on the land, buildings and total furnishings was then given to Maxwell securing the two transactions, one the note for $238,546.00, not bearing any interest, and a note for $170,000.00, representing the cash loan which carried simple interest at 10%, without any prior discount. The mortgage secured the lien of the furniture sale and the lien of the cash advance. Under the then existing law of Florida each of these transactions, considered separately, did not and could not have violated the criminal usury statute above set forth. The time sale of furniture was valid under all of the Florida decisions and was not affected by the usury statute. The loan of $170,000.00 in cash for a 10% simple interest did not violate any Florida statute.

At the time of closing the petitioner, American Acceptance Corporation, a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, and which corporation was not authorized to do business as such in Florida and was not doing business in Florida, agreed to lend The Maxwell Company certain sums of money and to take an assignment of the mortgage and the two separate notes as collateral security on a price or contract between American Acceptance and the Florida corporation, The Maxwell Company, which was not violative of any of the Florida statutes. There was no privity between American Acceptance, which was doing business solely with Maxwell, and the mortgagors, Schoenthaler and wife. At the time of the transaction between Maxwell and American Acceptance there were no statutes and no Court opinions of Florida which rendered the transactions between American Acceptance and Maxwell subject to any violations of the usury statute. At the same time there were no Court decisions or statutes of Florida which rendered the transaction between Maxwell and the Schoenthalers subject to any usury violations of Florida on either one of the two transactions.

The United States District Judge, Southern District of Florida, as well as the United States Court of Appeals for the Fifth Circuit, recognized those basic principles of law. However, the lower Court, as affirmed by the United States Court of Appeals for the Fifth Circuit, conceived or created a new relationship, without any statutory authority, because of the association under one mortgage of the two separate considerations, and held they had the right to combine the two separate transactions into one transaction as a loan transaction, disregarding the separateness of the time sale price of the furniture transaction and treating the entire transaction as a single loan. The Court applied the time sale price differential as coming within the

usury statutes and concluded that there was in this combination interest exacted under the contracts in excess of 25%, which was a criminal act requiring forfeiture under Chapter 687.07, F.S.A.

Under the basic decision by this Court in *Hogg* v. *Ruffner* (see S.C., 1 Black 115-121), 66 U. S. Supreme Court Reports, 17 Law Ed. 38, in analyzing an Indiana statute of similar import, this Court held that a time sale differential price for the sale of the property, both real and personal, could not be held to be included as being under the provisions of a usury statute where the usury statute controlled only where there was a loan for a sum of money in one instance, or some transaction which involved an extension of time in the enforcement of a loan of a sum of money.

Since that time the United States Court of Appeals for the Fifth Circuit, in the case of *Daniel* v. *First National Bank of Birmingham* (C.C.A. 5), 227 F. 2d 353, and on reconsideration 228 F. 2d 803, construed the federal statute on usury, Title 12, Sections 85 and 86, in such a way that it concluded that a Court, even in the absence of a statutory provision, could apply the federal usury statute to sales contracts on automobile transactions where at or about the time the sales contract was entered into the commercial paper was transferred to a third party, such as the bank in that particular case. This constitutes a usurpation of constitutional rights by a Court in creating a new contract between the parties by implication, and a merger of the transaction between the purchaser and the seller and the subsequent assignment of the purchaser's commercial paper to a third party into one transaction. That is the same doctrine which the United States District Court adopted in this case and which was affirmed by the United States Court of Appeals for the Fifth Circuit, with-

out any statutory authority in Florida other than their purported construction of Chapter 687.07.

The United States Court of Appeals for the Seventh Circuit, in the case of *In Re Oakes*, 267 F. 2d 516, which involved certain commercial paper growing out of the purchase of a precut house, construed the Illinois law by holding that the transaction simply evidenced the time price differential for the sale of property, and that the Courts could not assume the responsibility, without statutory authority from the statutes of Illinois, to treat that transaction as a loan for the purpose of determining whether the differential on the time sale price was under the usury law of Illinois.

The Indiana statute construed by this Court in the *Hogg* v. *Ruffner* case, supra, and the Illinois statute are identical in substance with the Florida statute, with the possible exception that the Florida statute, Chapter 687.07, which has been invoked in this case, is much clearer in its wording, which is as follows:

> "Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, * * * shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor."

In the Seventh Circuit decision (*In Re Oakes*, 267 F. 2d 516, 519, text p. 519), the Court quoted with approval from prior decisions of the Supreme Court of Illinois, and pointed out that at the time the transaction in that case

was entered into on July 28, 1956, the parties under the then existing Illinois law could make such bargain or contract for sale of property as they desired, and it made no difference whether the time price differential on this sale of property exceeded the usual rate permitted for a loan of money. The Court quoted with approval this statement:

> "'Discounts, at a rate greater than legal interest, for payment before the credit expires, are constantly allowed in commercial transactions with no thought of usury.'"

It is significant to note in that decision rendered in 1959, that it was disclosed that the State of Illinois on January 1, 1958, had passed a limited law governing retail installment sales and affording regulation of this type of commercial credit. The Seventh Circuit concluded that it did not have the power without statutory amendment to the Illinois law to hold that under the established commercial practice pertaining to time differential sales of personal property the usury statutes of Illinois were violated, and said: "we believe it should be done by the legislative process rather than by judicial decree."

Thus there is a dead conflict between the construction of "sales against loans" by this Court in the *Hogg* v. *Ruffner* decision, supra, and the Illinois case of *In Re Oakes*, supra, and the construction placed upon the same subject matter by the United States Court of Appeals for the Fifth Circuit in this case.

The question is squarely presented as to whether the action of the United States Court of Appeals for the Fifth Circuit in placing a new construction, or in fact making a new contract, between the parties, is violative of the United States Constitution, Article I, Section 10, denying the parties the right to contract, and whether that usage

or conclusion by the United States Court of Appeals for the Fifth Circuit does not actually violate the constitutional rights of this petitioner, by the denial of equal protection of the law and the taking of property without due process.

If the doctrine of this Court in the *Hogg* v. *Ruffner* case and the doctrine of the United States Court of Appeals for the Seventh Circuit in the case of *In Re Oakes* is correct, then the only way this new doctrine could be applicable would be if the legislature of Florida had prior to the commencement date of this transaction on April 29, 1964, passed additional statutory prohibitions on time sales pertaining to personal property. Admittedly that was not done. Even if the Florida legislature had thereafter amended the law so as to include time sale differentials as a part of the usury statute, that statute could certainly have no retroactive or ex post facto effect.

In the case at bar, when this transaction was consummated in the spring and early summer of 1964, the contracts between Maxwell, as the seller of the furniture, and the Schoenthalers, as the purchasers, were clearly not covered by any usury laws of Florida. There were no decisions of the Florida Courts which had ever construed a legitimate or valid sales contract with a time price differential as being controlled by the usury laws. There were no statutes or Court decided cases in Florida which would have been notice or knowledge to the petitioner, American Acceptance Corporation, that there was any purported violation of any of the laws of Florida, either statutory or Court decisions. Since it was doing business in interstate commerce it should not and could not constitutionally be charged with knowledge that the federal Courts, to-wit: the United States District Court, Southern District of Florida, or the United States Court of Appeals for the Fifth Circuit, could adopt a new theory late in

1965 and apply that retroactively or ex post facto to its transaction consummated in the early part of 1964 and create forfeiture and criminal penalties, thus giving an effect to a subsequent Court interpretation by the District Court having an ex post facto effect that could not have possibly been inflicted if the legislature of Florida had amended the law in 1965 in that respect.

In the opinion of the *In Re Oakes* decision, the United States Court of Appeals for the Seventh Circuit, as contained in note "1", page 519 of 267 F. 2d said:

> "For interesting discussions with reference to proposals that courts judicially declare that finance charges come under the prohibitions of usury statutes, we have been referred to the note 'Judicial and Legislative Treatment of "Usurious" Credit Sales', 71 Harv. L. Rev. 1143 (1958), and a case note on the application of usury statutes to credit sales in 57 Mich. L. Rev. 298 (1958)."

The second point, which is subsidiary to the main question above raised, is the fact that the Supreme Court of Florida had for many years, beginning with the case of *Mitchell* v. *Doggett*, 1 Fla. 356, as well as the case of *Benson* v. *First Trust & Savings Bank*, 134 So. 493, consistently construed the wording of Chapter 687.07 to mean that the Florida statute was only susceptible of one construction, because it specifically referred only to a loan of money in which the lender shall wilfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25% upon the principal sum loaned.

It has been pointed out in the cases above mentioned, particularly in the *Benson* case, that the use of the words "charge and accept a sum of money" in a penalty or criminal statute are derogatory of the common law doc-

trine, and could not be construed to hold that a mere contract to pay, which was never paid, could be the basis of a violation of that statute.

The United States Court of Appeals for the Fifth Circuit, in the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation* (5 Cir. 1960), 280 F. 2d 895, clearly reestablished that construction of the Florida statute. In the opinion involved in this case, the United States Court of Appeals for the Fifth Circuit departed from the existing law, and in a note on page 25 of its opinion said:

> "We are mindful of our decision in *Connor Air Lines, Inc.* v. *Aviation Credit Corporation,* 5 Cir. 1960, 280 F. 2d 859, cert. den. 364 U. S. 911, wherein the opposite construction was placed on the Florida usury statutes. However, the more recent Florida decisions just discussed place a different interpretation on these statutes. *Erie* requires us to follow the Florida decisions."

After the *Benson* decision in 1931 the law of Florida was consistent with the holding in that case; that is to say, that a mere contract to pay excessive interest is not covered in the forfeiture and criminal statute, and that there must be an actual charge or acceptance of a sum of money at that time.

In 1956 the Supreme Court of Florida, in the case of *Shorr* v. *Skafte,* 90 So. 2d 604, by a division opinion of four Justices, held that where a lender took a note for $6,000.00, payable on or before six months, and only loaned $5,000.00, that in a subsequent suit where the holder of the note sought to recover the $6,000.00, plus interest thereon, this was a contrivance or device and that since the interest rate was in excess of 40% and the holder of the note made demand, it amounted to a taking or acceptance under the construction of Chapter 687.07. Nowhere in the opinion

is there any discussion of a difference of the provisions in Chapter 687.07, which is a forfeiture or criminal usury statute, and Chapters 687.03 and 687.04, which provide for simple forfeiture of interest and other penalties.

In the *Shorr* v. *Skafte* case the Supreme Court did not even mention the *Benson* decision and apparently did not purport to overrule the *Benson* doctrine, but simply applied the forfeiture rule without ever analyzing the statute. That case was never construed to mean that Chapter 687.07 could be violated by a mere contract to pay interest in the future. There had to be an actual charge or acceptance, namely, a payment of something by the borrower and an acceptance by the lender, before the forfeiture and criminal statute was applicable.

The United States Court of Appeals for the Fifth Circuit, in the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation,* supra, clearly made that distinction in 1960 even in the construction of Chapter 687.04. The holding in that case would be applicable to the same charge or acceptance features of Chapter 687.07.

In the present opinion the United States Court of Appeals for the Fifth Circuit now abandons its construction of the Florida law in the *Conner Air Lines* case, and holds that it was required to do so because the Supreme Court of Florida in a later decision in 1962, *Home Credit Company* v. *Brown,* 148 So. 2d 257, had changed and departed from the long line of decisions, including the *Benson* case and subsequent decisions. The petitioner has contended in its petition for rehearing in the Appellate Court and in the supporting brief (Cert. Supp. R., pp. 1188 and 1211) that such a conclusion is not justified. The petitioner has contended that the doctrine of the *Benson* case and subsequent cases is still the law of Florida, and that the construction placed on the Florida Statutes in the *Conner Air*

Lines case was and still is the proper construction of the law of Florida. There is not one reference in the *Home Credit* opinion that makes a bona fide and fair sale of personal property on a time sale differential subject to the usury laws of Florida, and in particular Chapter 687.07. This will be covered later in our argument under Subdivision (H) of this petition.

The third question presented, which is subsidiary to the main question above raised, is shown in paragraph 5, on page 28, of the opinion of the United States Court of Appeals for the Fifth Circuit. The contention was made in the lower Court decree that in looking behind the whole transaction, the consideration was $180,000.00 in the admitted cash price of the personal property sold and $170,000.00 in the cash advanced, or a total of $350,000.00. The lower Court had associated or consolidated the two separate transactions and cast the furniture deal into a loan with the $170,000.00 cash loan; $100,000.00 of the cash loan was credited to Schoenthaler, together with the additional $70,000.00; and Schoenthaler in effect transferred that money to Willis H. Yeamans in satisfaction of the Yeamans purchase money second mortgage. Yeamans had entered into a guaranty contract between Maxwell, Schoenthaler and Yeamans where Yeamans would guarantee the first payments to Maxwell and in effect subordinate his right to the physical possession of the $100,000.00 until Schoenthaler had made certain stated payments on the mortgage. Yeamans had agreed that this $100,000.00 under the guaranty agreement would be placed on deposit with American Acceptance Corporation, for which American Acceptance agreed to pay 4% interest on the deposit. Maxwell actually funded to Schoenthaler, the mortgagor and purchaser of the furniture, the entire $350,000.00. Schoenthaler then transferred to Yeamans $100,000.00, and as an outside transaction Yeamans then

pledged that $100,000.00, which was his own money, as collateral to secure the first few payments.

The lower Court concluded that this circular payment and treatment of the $100,000.00 between Maxwell and Schoenthaler only constituted a net funding of $70,000.00 of the $170,000.00 cash loan. The lower Court then applied the usury rate, treating the entire transaction as a simple loan and not two transactions, and said that the interest of 10% contracted for on the $170,000.00 loan, added to the time sale differential price, or the difference between the $180,000.00 cash price and $238,540.00, which was the time sale price, constituted a charge or acceptance of more than 25%, but was based only on the $250,000.00 computation. On the one hand, all of the parties, including the lower Court, held that the title to the $100,000.00 actually passed to Willis H. Yeamans, which would be a consummation of the entire loan of cash or property advanced of $350,000.00.

There was no contention by American Acceptance, or by anyone in the case, that the $100,000.00 was not funded to Schoenthaler and then in turn paid to Willis H. Yeamans, thus calling for a satisfaction of his second mortgage. As the acknowledged owner of the $100,000.00, Yeamans then repledged that—not to Maxwell, but to American Acceptance Corporation, which had taken or had agreed to take an assignment of this commercial paper as collateral in the transaction with Maxwell, the seller of the furniture.

If the $100,000.00 passed to and belonged to Yeamans, the only way he could have received that money was from Schoenthaler, and the only way Schoenthaler received that money was from Maxwell. Therefore, the lower Court used the basis of $250,000.00 for a computation of usury, but ignored the other $100,000.00 in the computation of usury and ordered that American Acceptance not only for-

feit its claim to the $250,000.00 under the usury statute of Florida, but simultaneously ordered the specific performance of the alleged loan agreement, requiring the payment of that $100,000.00 to Willis H. Yeamans.

The question presented is that under the usury statute of Florida, Chapter 687.07, the sole and only penalty is the forfeit of the entire sum loaned, both principal and interest. If all other factors in the case are eliminated from consideration by this Court, then only $250,000.00, and any interest accruing thereon, could be forfeited. The answer to that problem is contained in the very last paragraph, on page 30, of the opinion of the Appellate Court, wherein it was said:

> "It was obviously the conclusion of the District Court that the $100,000 was part of the principal amount of the loan, although the loan was never funded with that amount so as to make interest computations allowable thereon. The fact that the loan was never funded with the $100,000 does not mean that that amount would not be forfeitable under 687.07. The $100,000 had to be either principal or interest. Whichever it was, it is forfeitable if the entire transaction is found to be criminally usurious."

No authority was quoted in the opinion of the lower Court or in the opinion of the Appellate Court, and there was no reference to a statutory provision of Florida to sustain not only the forfeiture of the funded part of the loan, but authorizing now the payment to Willis H. Yeamans, which would have completed the funding of the entire loan. If this funds the $350,000.00 portion, then there is no usury.

If this Court finds that on the first question presented the time differential on the sale of personal property is not within or covered by the Florida usury statute, then it would not be necessary to pass on the second and third questions as there would be no possible usury involved in the case in such an instance

(D) CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS

The portions of the United States Constitution relied upon are as follows:

Article I, Section 10, Paragraph 1, as follows:

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

That portion of the Fifth Amendment to the Constitution of the United States, as follows:

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VIII to the Constitution of the United States, as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV to the Constitution of the United States, Section 1, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statute, Chapter 687.07, which has been copied in full in Subdivision (C), Questions Presented. All of the pertinent provisions of the Florida usury statute which cover Chapters 687.03, 687.04 and 687.07 are attached hereto as Appendix "E".

(E) CONCISE STATEMENT OF FACTS

We submit an analysis of the facts upon which this litigation was presented and determined by the United States District Court, Southern District of Florida, because we do not feel that said Court in its opinion, beginning on page 1080 of the Record (App. A), gave proper consideration to all of the Record, which consisted, as set forth in the Court's own opinion, of the pretrial stipulations, exhibits, pleadings and depositions. There were no live witnesses or personal testimony presented for the Court's consideration, so that this Court has before it the exact record, exhibits, depositions and pretrial stipulations that were presented to the lower Court.

Referring now to the opinion of the lower Court, beginning in the Record on page 1081 (App. A), there are certain conclusions which that Court reached and we think the preliminaries to those conclusions which the Court reached should be pointed out to this Court. In substance, prior to April 28, 1964, Willis H. Yeamans owned certain property in the City of Naples, on the west coast of Florida, and he had conveyed that property to Edward P. Schoenthaler and Agnes A. Schoenthaler, and in consideration therefor the Schoenthalers executed and delivered to

Willis H. Yeamans a purchase money mortgage in the approximate amount of $119,500.00, securing a note in that amount which bore interest. The record does not disclose whether the Schoenthalers paid any cash consideration. This whole transaction, if not actually a joint venture, was the result of a very close relationship between Yeamans on the one hand as the owner of the property and the Schoenthalers on the other hand as the developers, because more or less simultaneously therewith Yeamans subordinated the lien of his purchase money mortgage to a construction money mortgage given in favor of the First National Bank of Miami, Florida, in the amount of approximately $1,350,000.00, and accompanied with that mortgage was a takeout of the mortgage agreement with the Trustees of the Central States, Southeast and Southwest Area Pension Fund. The peculiarity in the agreement was that the moneys to be advanced by the First National Bank of Miami were for the sole purpose of constructing a motel which was to be built in accordance with certain plans and specifications to be filed with Real Estate Research Corporation, the real estate appraiser for Central States, Southeast and Southwest Area Pension Fund. The commitment for the takeout of the construction money mortgage was conditioned upon the completion of the building and the installation of complete furnishings. These were required to be free and clear of lien so that at the time the Pension Fund could be called upon by the bank to take over the mortgage the building would have to be completed and furnishings installed, free and clear. The mortgage held by the First National Bank was to be assigned to the Pension Fund on a permanent financing first mortgage basis and was to encumber on a first lien basis not only land and buildings, but also all of the personal property which would constitute the furnishings and effects thereof.

It became apparent prior to April 28, 1964, that there was not enough money either in the possession of the Schoenthalers or coming out of the construction money to even complete the specifications and requirements of the first mortgage, and it was at that stage of the proceedings that Schoenthaler for the first time negotiated with The Maxwell Company of Miami, Florida, a large commercial furniture company which specialized in furnishing motels and hotels, as distinguished from a retail furniture company. The type and quantity of furniture Schoenthaler wanted to purchase from Maxwell included practically all of the furniture, fixtures and equipment required for complete compliance with the requirements of the first mortgage, with the exception of kitchen equipment which Schoenthaler had already purchased, but had not paid for, from an outside source. The amount of the furniture negotiated with Maxwell had a cash price of $180,000.00, and these individual items are shown in detail in the Record in Volume III, pages 892 through 958, which shows the actual signed orders, whereas in Volume I of the Record, pages 33 through 52, the invoices of Maxwell were set forth.

The lower Court merely mentioned some of this background in the opinion (Tr. 1081 and 1082, App. A), but the details as we have set forth herein were not mentioned by the lower Court in specific application to its findings. The said Court did find (Tr. 1082, App. A) that Schoenthaler had two distinct motives in dealing with the Maxwell Company, one for the purchase of the furniture and the obtaining of an absolute bill of sale therefor, which he was required to have, and the other for the cash out of which he could arrange for the satisfaction of the second mortgage held by Yeamans and to provide himself with cash to operate the motel.

The negotiations which had started prior to April, 1964, between Schoenthaler and Maxwell, culminated in a written agreement (Tr. 114), known as the commitment letter, which is the controlling factor in the determination of this case and is the agreement which is briefly mentioned by the District Court in its opinion on page 1082 of the Record (App. A).

This agreement was in the nature of a letter proposal signed by Maxwell, the Schoenthalers and Yeamans, wherein the parties agreed that Maxwell would sell furniture at the cash price of $180,000.00, or if purchased by Schoenthaler, on a deferred payment plan at the price of $238,000.00, payable without interest in equal monthly installments. In addition, Maxwell agreed to lend Schoenthaler $170,000.00 cash, which was to be evidenced by a promissory note bearing 10% interest. Both notes would be secured by Schoenthaler executing a second mortgage on the land, buildings and furniture, and guaranty agreements and endorsements from two parties who, in addition to Schoenthaler, were benefiting by the sale of the furniture and the lending of the money on the terms stated. The first guaranty of $150,000.00, as evidenced by their endorsement on the notes, was given by Congress International Inns, Inc., under which name the motel was to be operated. The second guaranty was to be a personal guaranty of Yeamans, who was interested in the transaction to the extent of getting his purchase money mortgage satisfied. The agreement further provided that Schoenthaler fully comply with the original commitment letter of October 11, 1962, by Central States, Southeast and Southwest Areas Pension Fund to Edward P. Schoenthaler (Tr. 118-119). This original commitment had been accepted, and under that commitment Schoenthaler had bound himself to carry out the full details, and Yeamans had become bound by that commitment because he subordinated his

purchase money mortgage as a condition to that commitment. This Court will note that between October 11, 1962 until April 28, 1964, some eighteen months had passed, at which time efforts were being made by Schoenthaler to complete the buildings, and by that time Yeamans was involved and so was Congress International Inns, Inc.

The other facts are set forth in detail in the letter proposal (Tr. 119). This actual commitment from Maxwell had first been approved by Dr. Willis H. Yeamans on April 23, 1964, at Fort Lauderdale, Florida, and was then actually signed by Maxwell and the Schoenthalers on April 28, 1964, at Miami, Florida, and accepted by Congress International Inns, Inc. on the 30th day of April, 1964. Yeamans had been an integral party in the final negotiations which led up to the four-party commitment and agreement. This Court will note, as reflected in the Record at page 33, that immediately upon the execution of the four-party agreement Schoenthaler gave a series of orders to Maxwell beginning April 30, 1964, which was the final date when Congress International Inns, Inc. accepted the four-party agreement. The petitioner, American Acceptance Corporation, was not a party to this four-party agreement and it was not until the 26th day of May, 1964, or twenty-six days later and after orders had been placed and deliveries made, when American Acceptance Corporation, a financial institution, came into consideration on the guaranty agreement. There is no dispute as far as American Acceptance is concerned that it had prior thereto been approached by Maxwell for financing to Maxwell in connection with the transaction Maxwell had entered into with Schoenthaler and that American Acceptance was advised as to the form of the notes that would be executed by the Schoenthalers and the general basis of the financing and security arrangements. It knew about the commitment agreement of April 28, 1964, entered into between

Maxwell and Schoenthaler, but it did not have any direct or indirect participation or negotiation with any other party than Maxwell. At the time this agreement of April 28, 1964, was entered into no specific institution had been designated as the escrow agent.

The terms and conditions of the commitment letter were consummated with the delivery of the furniture to Schoenthaler, the endorsement of the notes by Congress International Inns, Inc. and the execution by Schoenthaler of the guaranty escrow agreement (Tr. 122). The guaranty escrow agreement provided that the money which Yeamans was required to post with an escrow agent as security for his guaranty was to come out of the proceeds of Maxwell's $170,000.00 loan to Schoenthaler, from which loan Schoenthaler had to satisfy the Yeamans mortgage. By the terms of this guaranty escrow agreement both Schoenthaler and Yeamans assigned this $100,000.00 to the escrow agent yet to be named.

In the agreement of May 26, 1964 (Tr. 125), it had been provided that this $100,000.00 escrow would be placed with a financial institution, but it was not upon any request or demand of American Acceptance that it had to be the escrow agent. American Acceptance Corporation, as shown by the undisputed testimony in the deposition of John M. Lowe, vice president of Maxwell Company, and in particular as reflected on page 722 of the Record, had entered into an agreement with Maxwell to lend it the sum of $350,000.00, and that as security for that loan the collateral assignment of the Schoenthaler notes and mortgages, endorsed by Maxwell with full recourse and as further evidence of the debt, received a promissory note executed by Maxwell in the amount of $350,000.00. This note was based upon a fixed fee contract which had been in force and effect between Maxwell and American Ac-

ceptance on many other prior transactions wherein Maxwell paid American Acceptance approximately 5% add-on interest (Tr. 390). Mr. Lowe, comptroller for Maxwell, testified in his deposition (Tr. 723) that the standard rate which Maxwell charged as a time differential price used on furniture sales was at an approximate rate which was called "6% add-on". He pointed out that this was the usual practice even though each transaction with their purchasers was separately negotiated, and he stated that the 6% add-on on the furniture sale so far as Schoenthaler was concerned was the approximate standard, and so far as he knew that was what had been charged.

On page 724 of the Record, in Mr. Lowe's deposition he said that on some smaller transactions the computation on furniture sales ran as high as 6¼% add-on, and he explained the transaction further by stating that when the time charges received from the purchaser were received and paid where the paper had been assigned to American Acceptance, then there was an accounting between Maxwell and American Acceptance and if the amount received from the customer on the time sale charges exceeded the basic 5% add-on interest charged to Maxwell, then American Acceptance rebated to Maxwell, or if those amounts did not exceed or were in fact less than 5% add-on Maxwell repaid the difference to American Acceptance. Mr. Lowe established without any contradiction in the Record (p. 725) that this was the whole basis for the handling of this assigned financing with American Acceptance and that in no event under his computations could American Acceptance by contract or otherwise receive more than this amount of $350,000.00, plus the 5% add-on computations. Mr. Lowe also established (Tr. 726) that it was Maxwell's practice to cooperate and work with American Acceptance in the event of any defaults, and that in

many instances where there were defaults Maxwell would then repurchase or have a retransfer of the particular account back in the name of the Maxwell Company.

In the testimony in the deposition of Mr. Toby Carroll, attorney for Dr. Yeamans and also for the Schoenthalers (Tr. 570), Mr. Carroll stated that on or about the 26th day of May, 1964 he had some discussions with Mr. Aaron Kanner, the attorney for Maxwell Company, and had discussed the actual party who would hold the $100,000.00 belonging to Dr. Yeamans as the escrow agent (referred to in some parts of the agreement as a bank and other parts as a financial institution) and that he had agreed with Mr. Kanner that American Acceptance "would be okay" (Tr. 573), and he testified that he would then send a wire to Mr. Kanner to that effect. He had mentioned prior thereto (Tr. 572) that he thought the commercial bank rate would be 3½% and that he and Mr. Kanner, Sr. had discussed whether they could get 4% if the money was escrowed with American Acceptance. Nothing had been definitely settled until Maxwell, through J. M. Lowe, vice president, had directed a letter to American Acceptance Corporation, Six Penn Center Plaza, Philadelphia, Pa., Attention: Mr. Elmer Rosenberry, dated June 3, 1964 (Tr. 361), in which Mr. Lowe advised Mr. Rosenberry that a Mr. Logan of American Acceptance had verbally agreed that if American Acceptance was to be the escrow agent they would accept it and pay 4%. In this same letter it is shown that the guaranty escrow agreement was for the first time sent to American Acceptance for its approval.

On June 5, 1964 (Tr. Vol. I, p. 364) the president of American Acceptance Corporation wrote the following letter:

"Mr. John M. Lowe
The Maxwell Company, Inc.
7321 N. E. 2nd Avenue
Miami, Florida 33138

Dear John:

We are returning herewith the original of the Guaranty Escrow Agreement which is to be used in connection with the Schoenthaler transaction.

We understand that if the $100,000 is lodged with us, we are to pay Dr. Yeamans interest at the rate of 4% per annum on this sum, payable quarterly.

Very truly yours,

President."

We have mentioned these portions of the Record because in the opinion of the District Judge (Tr. 1083, App. A) the Court laid great stress upon the assumption that American Acceptance had initially instigated this whole transaction. The District Judge implied that this was a wilful and deliberate scheme whereby American Acceptance would not ever lend more than $250,000.00, but would charge interest on $350,000.00. The money resulting from the Yeamans escrow of $100,000.00 security was never a request or a demand from American Acceptance Corporation. It was a collateral matter entered into after the commitments had been completed and the transactions consummated by the recording of the mortgages on May 26, 1964. We say this confusion in the Record was brought about solely because the District Court found that something that was entirely an aftermath related back and infused the entire transaction with the intent to commit wilful and criminal usury. The District Court said in its opinion (Tr. 1087, App. A):

> "This is a different situation, indeed, than had the plaintiff paid $100,000 to Yeamans and he had then deposited it with a stranger as escrow agent or had the plaintiff itself earmarked and segregated the funds. But it did neither and never did part with the funds."

This Court will note that in the opinion of the District Court, reflected at page 1086 of the Record (App. A), it treated the total funding of this loan by Maxwell to Schoenthaler at $250,000.00, and then by the application of certain mathematical computations the District Court found that based upon $250,000.00, and treating the entire transaction as one loan and not a separate sale and a separate loan, there was usury above the rate of 25%.

We point out as a part of the history of this case, particularly with reference to pages 1086 and 1087 of the Record, that insofar as the Schoenthalers are concerned the District Court found that there was only $250,000.00 actually funded, but that in the next paragraph so far as Yeamans is concerned the District Court treated the funding of the loan at $350,000.00 and directed that the $100,000.00 be then paid from the escrow to Yeamans.

(G) BASIS FOR FEDERAL JURISDICTION IN A COURT OF FIRST INSTANCE

This suit was initially filed in the United States District Court, Southern District of Florida, as a diversity action under Title 28, Section 1332, because the petitioner, American Acceptance Corporation, was a Delaware corporation, having its principal place of business in Philadelphia, Pennsylvania, and all of the defendants were citizens of the State of Florida, and the property sought to be foreclosed was within the jurisdiction of the United States District Court, Southern District of Florida.

(H) REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Under Subdivision (C), Questions Presented, three distinct reasons were assigned why this Court should grant the writ. All three reasons grow out of the interpretation of Chapter 687.07 of the Florida usury statute, commonly referred to as the criminal and forfeiture usury statute.

The first question presented is on the basis that this Court in the case of *Hogg* v. *Ruffner,* (see S.C., 1 Black 115-121), 66 U. S. Supreme Court Reports, 17 Law Ed. 38, construed a similar statute of the State of Indiana to cover only loans for money and interest charged thereon, or interest or charges made for forbearance to sue or collect upon loans of money, and this Court specifically held that statutes of that class and wording could not be extended to time differentials on the sale of property.

The petitioner has shown that the United States Court of Appeals for the Seventh Circuit, in the case of *In Re Oakes,* 267 F. 2d 516, construed a similar transaction under a similar statute of the State of Illinois so that it did not apply to support a usury claim on a bona fide contract for the sale and installation of a pre-cut house. In this case that Court concluded by saying that before such a broad interpretation of the usury statutes would apply to the time sales and time price differentials, it was a matter for the legislature of Illinois to amend its laws and was not for the Courts to rewrite the usury laws or rewrite the contracts between the parties so as to bring about a conclusion clearly not covered in the then existing statutes.

The petitioner then set forth that the United States Court of Appeals for the Fifth Circuit, in construing a similar provision in the federal usury statutes applicable to na-

tional banks had without any statutory modification held that the Court had the right to implement the statute and to construe for equitable purposes a new contract between the parties over and beyond the written agreements, and to construe that the Court had the inherent power to set aside these commercial transactions and to construe a time sale differential price on the sale of tractors as a violation of the usury statutes. This decision is in conflict with the prior decision of this Court in the *Hogg* v. *Ruffner* case, supra, and is in direct conflict with the holding of the United States Court of Appeals for the Seventh Circuit in the case of *In Re Oakes,* supra.

The petitioner contends that the present decision for which certiorari is now sought is in direct conflict with the prior opinion of this Court, as aforesaid, in the opinion of the said United States Court of Appeals for the Seventh Circuit, in that it has even gone beyond the rulings in the previous cases and held that a contract for the sale of personal property on a time price differential, even though it was a valid and bona fide sale, is drawn into and becomes merged into a loan for money, and that even though the loan for money was not usurious and even though the time sale differential was not usurious, the fact that the transactions occurred between the same parties they would be considered as one loan and the time sale differential would be considered as usury applicable to the cash consideration.

In the opinion in *In Re Oakes,* 267 F. 2d 516, the United States Court of Appeals for the Seventh Circuit made particular reference to a comprehensive note in *71 Harvard Law Review, page 1143,* and we refer to a few excerpts from this article. While prepared and published in 1958, the subject matter of the article, the factual background and the various laws applicable are most timely.

The Congress of the United States has been holding public hearings and studying the financing and credit industry as a whole, with the view of preparing or passing remedial legislation on the interstate use of various financing contracts and time sale differentials between a cash sale price and a time differential price. There are very few states where any statutory enactments have been completed, and apparently there is no federal legislation at the present time. The authors of this article say (see page 1143):

> "The problem whether statutes prohibiting usury apply to conditional-sales transactions is of obvious importance in the present period of extensive credit buying. A few states have statutes which expressly forbid excessive interest charges in credit transactions. Most states, however, have statutes which prohibit only in general terms the charging of higher than a stated rate of interest for 'loan or forbearance of money.' In addition to state legislation, a similarly general federal statute prohibits usury on the part of national banks. Whether the framers of these statutes intended them to apply to installment-purchase transactions is unclear. The statutes normally contain no reference to conditional sales and similar installment devices, nor is the matter discussed in any available legislative material. Moreover, most laws against usury antedate the present boom in credit buying.
>
> Until recent years most American courts have consistently held that these statutes do not apply to conditional-sales contracts. The traditional view is that sale-and-purchase arrangements cannot be assimilated to loans and that only loans are covered by the usury statutes. Most jurisdictions adhering to the majority rule add the qualification that there must be a bona fide intent to buy something; the parties will not be allowed to conceal a usurious loan in the form of a conditional sale. In the last few years a number of

courts have had occasion to re-examine the traditional approach and for the first time have found violations of the usury laws in connection with bona fide conditional sales. Minnesota led the way in 1944, followed in 1954 by Arkansas, which prospectively overruled a long line of prior claims. Three more states have adopted this view, and a fourth appears to be wavering. In the leading case of *Daniel* v. *First National Bank*, the Court of Appeals for the Fifth Circuit construed the federal usury provision as applying to a conditional-sale contract discounted by a national bank. This Note will examine the central problem presented by these cases: whether existing usury statutes, designed to protect borrowers, should be construed to apply to consumer-credit transactions."

Later in this note (p. 1145) the authors say:

"Those courts which have found violations of usury laws in consumer-credit transactions have generally qualified the scope of their decisions by adopting the doctrine of 'bona fide time price.' "

The authors make this further comment on page 1148:

"A court convinced that usury legislation should have been applied to conditional sales initially must still face the question whether it is wise to overrule the traditional view now. Since the time the courts first excluded conditional sales from the scope of the usury laws, credit selling and the financing of dealers through the purchase of conditional-sales notes by financing institutions have become a basic feature of the national economy, particularly in connection with the sale of automobiles. In 1956, 63 per cent of all new automobiles and 58 per cent of all used cars sold were sold for credit. In April, 1957, of the 31,532,000,000 dollars in consumer-installment-credit paper outstanding, 14,659,000,000 dollars was automobile paper, of which the vast majority represented conditional-sales contracts. Of the total installment credit outstanding, 27,493,000,000 dollars was held by

financial institutions as compared to only 4,039,000,000 dollars held by retail credit outlets. The commercial banks alone held 11,960,000,000 dollars in installment paper, including 3,713,000,000 dollars in purchased auto paper and 2,313,000,000 dollars in direct auto paper. To the extent that this business has developed in reliance on the traditional judicial view, the argument that a court should be reluctant to change its established position when the statute is at best ambiguous is strong indeed. Unless the impact of a reversal is made prospective only, the result could be disastrous. It seems to be generally assumed that most discounting of conditional-sales contracts by financial institutions is carried on at usurious rates. If, under the Fifth Circuit's test in *Daniel*, this fact is enough to put a bank on notice of usury in the original contract, tremendous numbers of completed transactions would be called into doubt."

We continue to quote from the note at the bottom of page 1148:

> "The long silence of the legislatures in the face of judicial decisions excluding the purchase-transaction field from the scope of usury legislation may also be of some significance. Despite judicial decisions in two-thirds of the states over a period of many years holding usury laws inapplicable, no state legislature has ever specifically subjected installment sales to its general usury law."

There is no Florida statute applicable, and the line of decisions mentioned by the United States District Court in the first opinion in this case conceded that there are many cases in Florida holding that time price sales contracts are not covered by the usury law of Florida. The lower Court conceded that there was no usury involved in the loan of $170,000.00, separate and apart from the sale of the furniture, because that was a simple interest at 10% on outstanding principal balances. However, the lower Court held that where the two matters, one the sale

of the furniture and the other a separate supplemental loan, occurred at or about the same time, a new contract or a new conception is created through the merger or marriage of the two transactions and it became one transaction, a loan.

No cases have been submitted to the Court, nor has our research resulted in the discovery of any cases supporting this doctrine which was affirmed by the United States Court of Appeals for the Fifth Circuit. While the transaction here involved was a usual and customary transaction in interstate financing and was simply a repetition of thousands of similar types of transactions as reflected in the statistics in the Harvard Law Review article, yet the petitioner herein has been inflicted with a loss or penalty of some $400,000.00.

The Supreme Court of Florida in the case of *Yaffee* v. *International Company, Inc.*, 80 So. 2d 910, a 1955 decision, said this in headnote 6:

> "Usury statutes do not have the effect of invalidating contracts for interest at a rate higher than statutory maximum, but only accord to the obligor the personal privilege of setting up or waiving affirmative defenses of usury in respect to such contracts."

This is taken directly from the opinion in paragraph "6", on page 912. In this case it appears that prior to the effective date of Chapter 28170, Laws of Florida 1953, a corporation, as mortgagor or borrower, was not permitted to interpose the defense of usury in any action in any Court in Florida. By the law of 1953 that prohibition was removed. The issue was raised by the borrower, a corporation, which had consummated the loan prior to the change of the law, and the Supreme Court of Florida was required on appeal to review a decision of a state Court which had held that the usury plea could be asserted by a

corporate mortgagor on a transaction consummated before the law was changed. The Supreme Court of Florida reversed that decision, and stated (see paragraph 5, p. 912):

> "This being the nature of corporation contracts made under such a statute, it is plain that however an abrogation of the statute is sought to be accomplished, whether by repeal or by an affirmative enactment, the effect of applying the provisions of the statute retrospectively would be to apply usury penalties to corporate obligations which, when made, were subject only to rules of common law under which interest rates were not limited; and hence such application would be in violation of constitutional provisions which forbid the enactment of laws impairing the obligation of contracts."

The case of *Home Credit Company* v. *Brown*, 148 So. 2d 257, a 1962 decision by the Supreme Court of Florida, was first passed upon by the District Court of Appeal of Florida, Second District, in *Brown* v. *Home Credit Co.*, 137 So. 2d 887. This case in the District Court of Appeal involved the question of whether two notes providing for a 10-year installment payment without interest, if accelerated at the early stage of the transaction (and in this case within four months after they were executed), and where the assignee of the notes filed a suit for the full amount of the notes, plus interest, could by acceleration with the full demand be construed to be usurious. There was no time sale price differential of personal property involved. There was no bona fide sale of any personal property or of any real property involved.

Neither the opinion in the District Court of Appeal of Florida, Second District, or the opinion in the Supreme Court of Florida in the subsequent decision, 148 So. 2d 257, purport to recede from the long line of decisions in Florida, beginning with *Davidson, et al.* v. *Davis*, 52 So.

139; *Perry* v. *Beckerman* (S. Ct. Fla. 1957), 97 So. 2d 860; *B & D, Inc. of Miami* v. *E-Z Acceptance Corporation* (D.C.A.F. 3, 1966), 186 So. 2d 29; and *Connecticut Mutual Life Insurance Company* v. *Fisher*, 165 So. 2d 182, cert. den. S. Ct. Fla. 1965, 171 So. 2d 392. In this latter case the District Court of Appeal of Florida thoroughly reviewed all of the background decisions in Florida, and that Court said (see text, second column, p. 185, 165 So. 2d 182):

> "* * * We are, however, impressed by this record which shows a long time loan on businesslike and customary terms, and the absence of proof of the existence of a corrupt intent to take more than the legal rate of interest for the use of the money loaned. The chancellor appears to have given undeserved significance to the actuarial computation submitted by the plaintiffs in support of their motion for summary final decree, which computation projected the total of the interest that would be payable on the principal and on deferred interest if the specified installments of principal and interest were not paid as contracted for and should be allowed to become and remain in default. * * * 'Usury is largely a matter of intent and is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a purpose in his mind to get more than legal interest for the use of his money.' Therefore, such actuarial computation was without directional force to point out usury in the transaction, in the absence of a showing that it was a scheme or device entered into with corrupt intent to charge more for the loan than the rate of interest allowed by law."

On this phase the Court concluded (text p. 186, first column):

> "* * * If a loan when complied with as agreed upon will not involve an unlawful rate of interest 'the legal consequences of such an arrangement must be tested by the results contemplated by the parties on the as-

> sumption that both lender and borrower will fully carry out their agreement rather than the special results which may follow, but are not necessarily certain to ensue, when the borrower breaches a covenant.'"

The District Court of Appeal of Florida, Second District, which issued the first opinion in the case of *Brown* v. *Home Credit Co.*, 137 So. 2d 887, has just recently on April 24, 1968, issued an opinion, not yet officially reported, *Willie Marvin Lord, et al.* v. *Ernest O. Hodge, Sr.*, a copy of which is attached hereto as Appendix "F". This opinion involved the construction of the Florida usury laws and correctly found that under the law of Florida there are four elements which are essential before the Florida usury penalty statutes apply: (1) a loan, express or implied; (2) an understanding between the parties that the money loaned is to be returned; (3) payment or agreement to pay a greater rate of interest than is allowed by law; and (4) a corrupt intent to take more than the legal rate.

The Court found that the first three elements were present, but it could not assume that those first three elements being present would supply the inference of the fourth requirement, namely, that there must be a corrupt intent to take more than the legal rate and that requirement could only be substantiated by plain and clear evidence. The doctrine of that case fully supports the interpretation placed upon the Florida law of usury by the District Court of Appeal of Florida, Third District, in the *Connecticut Mutual Life Insurance* case, supra.

Referring again to the case of *Conner Air Lines, Inc.* v. *Aviation Credit Corporation*, 280 F. 2d 895 (U.S.C.A. 5, 1960), which case has been receded from or reversed by this last opinion of the United States Court of Appeals, Fifth Circuit, in the case at bar, in that opinion the Court said this (first column, p. 899):

"* * * Authorities are cited showing it to be the law of Florida that the difference between a cash price offered and a credit price agreed upon is not to be regarded as interest so as to invoke the application of the law against usury. Dillon v. J. W. Walter Co., Fla. App., 98 So. 2d 391."

That law of Florida has never been changed, and the opposite conclusion could not be constitutionally or judicially applied in the case at bar, unless the United States District Court, Southern District of Florida, and the United States Court of Appeals, Fifth Circuit, in the opinion sought to be reviewed had actually made a finding of fact based upon competent evidence that this sale of furniture and fixtures by Maxwell to Schoenthaler was only a pretended or fictitious sale. There was no evidence and no finding by either the trial Court or the Appellate Court, because such a finding would have been contrary to the undisputed documentary evidence as reflected by the letter of July 9, 1964, from Edward P. Schoenthaler and Agnes A. Schoenthaler, his wife, to The Maxwell Company, Inc., which is set forth in Volume I of the printed record, at page 188, and which is as follows:

"July 9, 1964

The Maxwell Company, Inc.
P.O. Box 38-278
Miami, Florida

Gentlemen:

Your company heretofore, under date of April 28, 1964, delivered to the undersigned a commitment letter wherein you agreed to sell to us certain furniture, fixtures and equipment for a deferred purchase price of $238,484.14, and to also loan to us the sum of $170,000.00 in cash. In connection with this commitment and as security for the indebtedness which we owe to you of $408,484.14, we have delivered to you two promissory notes, one for $238,484.14, which said note bears interest after maturity at the rate of ten

(10%) per cent per annum, and the other note for $170,000.00, which note bears interest from date at the rate of ten (10%) per cent per annum, payable monthly. As security that the aforesaid notes will be paid according to the tenor thereof, we have delivered to you our mortgage encumbering the land and property at premises generally known and identified as 'Old Cove', Naples, Florida, and also known as Tahitian Cove Congress Inn, Naples, Florida, and our chattel mortgage encumbering the furniture, fixtures and equipment installed at the said premises aforesaid. The land mortgage has been recorded in the Public Records of Collier County, Florida, in Official Records Book 168, at Page 497 thereof. The chattel mortgage, at our request, has not been recorded to date.

We acknowledge receipt from you today of Bill of Sale covering said personal property referred to in the commitment and which said Bill of Sale also covers additional personal property in excess of the amount referred to in said commitment, and we also acknowledge receipt from you today of the sum of $37,112.18, which has been delivered to us in the form of a check dated the 29th day of June, 1964.

We acknowledge that the commitment has been discharged by you in the following manner:

(a) By Bill of Sale to furniture to the amount of $238,484.14 purchase price, based on purchase price being paid in sixty (60) equal monthly instalments commencing August 1, 1964.

(b) By Bill of Sale to additional purchase of furniture not included in Item (a), for which we are paying cash, this item being a charge against the $170,000.00 cash loan, this purchase totaling $32,887.82.

(c) check this date received in the amount of $38,112.18.

(d) $100,000.00, which has been deposited with American Acceptance Corporation, as per Dr. Yeaman's Guaranty Agreement.

We acknowledge that you have fully complied with each and every item as required to be done by you under the terms of your commitment to us; that, with the exception of that furniture to which reference will be hereafter made in this letter, you have fully delivered to us all items of personal property purchased by us from you; that such personal property has been installed at the Tahitian Cove Congress Inn at Naples, Florida, and is now at said premises, this said location being the same premises as described in the real estate mortgage which we gave to you; that, in all respects, you have fully discharged all of the requirements of the commitment to us, including the installation and delivery of personal property to our motel within the time limits required in the commitment. We acknowledge that certain of the said personal property was not delivered by June 1, 1964, but at a subsequent date thereto, and we specifically do hereby release you from any right, claim, demand, or liability to us by reason thereof. We acknowledge that we have no right, claim, demand or offset against the payment of the sums of money required to be paid by us under the terms of the notes and mortgages hereinabove referred to.

We acknowledge that the indebtedness evidenced by the promissory notes and secured by the land mortgage and chattel mortgage aforesaid is a valid, outstanding indebtedness due and payable by us to you or your assignee, and that we have no offset, counterclaim or defense to the payment of the same whatsoever, and that our indebtedness, as evidenced by said promissory notes and mortgages, is absolute in every respect.

In reference to furniture which has not been delivered, the same consists of furniture for the lobby of the motel and chairs for the bar in the Cove restaurant. We understand these items are on order and will be delivered to us as soon as received by you. There is also some miscellaneous small items which you will deliver as soon as received. We acknowledge

that the non-delivery to this date is not occasioned through any fault of yours and we acknowledge that we have no claim against you because of the non-delivery of the same to date. We also recognize that it may be one month before complete delivery has been effectuated.

Very truly yours,

EDWARD P. SCHOENTHALER
and
AGNES A. SCHOENTHALER,
(Seal) By EDWARD P. SCHOENTHALER."

Respectfully submitted,

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WILLIAM GRESHAM WARD
1240 duPont Building
Miami, Florida 33131

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RICHARD AARON KANNER
1150 N. W. 14th Street
Miami, Florida 33136
Attorneys for Petitioner, American Acceptance Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed on the ..... day of May, 1968, to Thomas A. Horkan, 236 Security Trust Building, Miami, Florida, attorney for Edward P. Schoenthaler and Agnes A. Schoenthaler, husband and wife, and Morgan, Carratt & O'Connor, 605 Kennan Building, Fort Lauderdale, Florida, attorneys for Willis H. Yeamans.

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WILLIAM GRESHAM WARD